

DECISION



19311 *Fitzmaurice*
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-203589

DATE: September 02, 1981

MATTER OF: AMS Manufacturing, Inc.

DIGEST:

1. Failure of the two lowest bidders to comply with IFB's option provision is not material deviation requiring rejection of bid as non-responsive since option is not being evaluated in determining awardee.
2. Bidder that did not submit offer under IFB option provision did not obtain unfair competitive advantage since contingency factor protester added into bid for basic quantity in anticipation that Government might not exercise option was matter of business judgment, and nothing in IFB indicated that offer for option was mandatory.

AMS Manufacturing, Inc. (AMS), protests the award of a contract to any other bidder under invitation for bids (IFB) No. DAAA09-81-B-0049, issued by the United States Army Armament Materiel Readiness Command (Army), Rock Island, Illinois.

The IFB solicited bids for 274,054 lifting plugs for use on four different types of projectiles. Ten bids were submitted, and the four lowest bidders were as follows:

- (1) Solar Flame, Inc.
- (2) H/R Products, Inc.
- (3) Amron Corporation
- (4) AMS

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AMS claims that the Amron Corporation is not a small business and thus cannot compete under this 100-percent small business set-aside. In addition, AMS argues that the bids of Solar Flame and H/R Products should be rejected as nonresponsive because of failure to comply with the IFB's Surge Option provision. That is, Solar Flame left the provision blank, and H/R Products submitted only production rates, but no prices.

We conclude, however, that AMS's protest is without merit.

The question of Amron Corporation's small business size status has been referred to the Small Business Administration for a decision, and AMS agrees that the Small Business Administration is the agency with jurisdiction over this matter. Therefore, AMS's protest has become solely a question of whether the bids of Solar Flame and H/R Products are nonresponsive.

The IFB provision entitled "Surge Option for Increased Quantity" provides in pertinent part:

"The surge option for increased quantity will be exercised only in response to receipt of requirements to support a combat operation, in support of combat losses of a friendly foreign government, or an imminent national emergency.

"The Government reserves the right to increase the quantity of items * * * by a quantity up to and including but not exceeding 500 percent at a production rate and ceiling price of Level I (one shift maximum rate) _____ per month/\$_____, Level II (two shifts) _____ per month/\$_____. There must be a separate production rate and ceiling price for each contract line item. * * * The Contracting Officer may exercise this option any time a surge condition develops, until acceptance by the Government of the last scheduled item on the contract, provided, however, that the option is exercised by giving written notice to the Contractor."

In addition, section "M" of the IFB, which sets out the evaluation factors, provides in paragraph M.7, entitled "Evaluation of Options," the following:

"The evaluation of offers will be on the basis of the quantity to be awarded, exclusive of the option quantity. Offers deleting the Option for Increased Quantity Clause in Section H (paragraph H.4) will not be considered non-responsive."

The Army contends that the failure to complete the Surge Option provision does not render a bid nonresponsive. The Army points out that bids must be evaluated on the basis specified in the solicitation and that paragraph M.7 states that bids will be evaluated "exclusive of the option quantity." Moreover, the Army notes that our Office has held that failure to quote prices on option quantities does not render a bid nonresponsive if, as here, the option quantities are not to be included in the bid evaluation process.

AMS, however, argues that paragraph M.7 refers only to paragraph H.4, "Option for Increased Quantity," and not to the Surge Option provision because of the above-quoted second sentence of paragraph M.7 and the reference to a single option quantity in the first sentence. Thus, AMS contends that, since nothing in the IFB permits bidders to delete the Surge Option provision, that option is for evaluation and any failure to comply with it renders a bid nonresponsive.

AMS also argues that if all bidders are not required to satisfy the Surge Option provision, the bidders are not competing on an equal basis. AMS reaches this conclusion because, if a bidder does not comply with the Surge Option provision, it does not have to keep its facilities fully committed up until the completion of the contract as the Surge Option provision requires; as a result, that bidder can offer a lower price than the bidder which complies with the Surge Option provision. AMS cites our decision in the matter of Orlotronics Corporation, B-200381, April 22, 1981, 81-1 CPD 308, in support of this argument.

Defense Acquisition Regulation (DAR) § 1-1504(a) (1976 ed.) establishes a general policy that "solicitations containing option provisions shall state that evaluation will be on the basis of the quantity to be awarded exclusive of the option quantity." If the Government is to exercise the option at award and/or evaluate the option for award purposes, the solicitation must include an "Evaluation of Options" provision clearly providing for evaluation. DAR § 1-1504(b), (c), and (d). In this connection, we have held that where the solicitation does not include option prices in the evaluation and where it is not specified that option prices may not exceed a particular ceiling, a bidder's failure to quote option prices is not a material deviation and its bid should not be rejected as non-responsive. 51 Comp. Gen. 528 (1972). Further, we have held that the lack of any reference in the solicitation to the evaluation or exercise of an option at the time of award is sufficient to inform bidders that option prices will not be considered in the evaluation of bids. 52 Comp. Gen. 614 (1973).

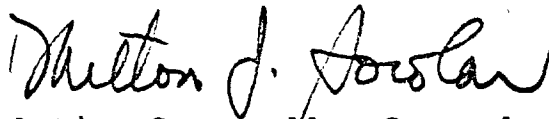
In our view, paragraph M.7 reflects the general policy, established by DAR § 1-1504(a) through (d), that option provisions will not be part of the evaluation process. Moreover, the required clause to evaluate options is not included in the IFB. While the language of paragraph M.7 could be clearer, we do not believe that it alters the general policy merely because the Surge Option provision is not mentioned. As indicated above, unless a solicitation specifically provides for the evaluation of options, the contracting agency will not evaluate them and bidders are on notice of this fact. 52 Comp. Gen. 614, supra. Therefore, since nothing in the IFB states that the Surge Option provision will be part of the evaluation, it would not be proper for the Army to include this provision in the evaluation of bids. Since the Surge Option provision is not being evaluated and there was no ceiling on option prices, the failure to comply with the provision is not a material deviation which requires bid rejection. 51 Comp. Gen. 528, supra.

We also find no merit to AMS's argument that bidders which do not comply with the Surge Option provision have an unfair competitive advantage over compliant bidders.

We are of the view that it is a matter of business judgment on the part of each bidder to determine the most advantageous way to structure bids. AMS has pointed out a contingency which some bidders might wish to consider when developing bids. However, this contingency is no different from other option situations where the contractor does not know until the basic contract period is almost expired whether the Government will exercise an option. It is up to the individual bidder to submit a competitive price taking into consideration the fact that option provisions may not be exercised. No unfair competitive advantage arises where, as here, a bidder makes no offer under an option provision which is not being evaluated since, in effect, the bidder has decided to forego the potential business offered by the option provision.

AMS has cited Orlotronics Corporation, supra, in support of its position. This decision, however, can be distinguished from the facts presented in the AMS protest. In Orlotronics, the IFB contained a specific restriction against the price offered for the option quantity being higher than the price offered for the basic quantity and warned bidders that failure to comply with this restriction could result in bid rejection as being prejudicial to the other bidders. Such a restriction, however, is not present in the IFB in question. See 51 Comp. Gen. 528, supra.

Protest denied.

A handwritten signature in dark ink, reading "Milton J. Jordan". The signature is fluid and cursive, with the first name "Milton" and last name "Jordan" clearly legible.

Acting Comptroller General
of the United States